U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 11244066

Date: APR. 19, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner, an entrepreneur, seeks second preference immigrant classification as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not qualify for classification as a member of the professions holding an advanced degree or as an individual of exceptional ability, and that he had not had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.

On appeal, the Petitioner submits a brief asserting that he is eligible for exceptional ability classification and a national interest waiver.

In these proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. LAW

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

Section 203(b) of the Act sets out this sequential framework:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –

(A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of job offer –

(i) National interest waiver. . . . [T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definition: "*Exceptional ability in the sciences, arts, or business* means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." In addition, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the specific evidentiary requirements for demonstrating eligibility as an individual of exceptional ability. A petitioner must submit documentation that satisfies at least three of the six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii).

Furthermore, while neither the statute nor the pertinent regulations define the term "national interest," we set forth a framework for adjudicating national interest waiver petitions in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).[1] *Dhanasar* states that after a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion[2], grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.

The first prong, substantial merit and national importance, focuses on the specific endeavor that the foreign national proposes to undertake. The endeavor's merit may be demonstrated in a range of areas such as business, entrepreneurialism, science, technology, culture, health, or education. In determining whether the proposed endeavor has national importance, we consider its potential prospective impact.

The second prong shifts the focus from the proposed endeavor to the foreign national. To determine whether he or she is well positioned to advance the proposed endeavor, we consider factors including, but not limited to: the individual's education, skills, knowledge and record of success in related or similar efforts; a model or plan for future activities; any progress towards achieving the proposed

[1] In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998) (*NYSDOT*).

[2] *See also Poursina v. USCIS*, No. 17-16579, 2019 WL 4051593 (Aug. 28, 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

endeavor; and the interest of potential customers, users, investors, or other relevant entities or individuals.

The third prong requires the petitioner to demonstrate that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. In performing this analysis, USCIS may evaluate factors such as: whether, in light of the nature of the foreign national's qualifications or the proposed endeavor, it would be impractical either for the foreign national to secure a job offer or for the petitioner to obtain a labor certification; whether, even assuming that other qualified U.S. workers are available, the United States would still benefit from the foreign national's contributions; and whether the national interest in the foreign national's contributions is sufficiently urgent to warrant forgoing the labor certification process. In each case, the factor(s) considered must, taken together, indicate that on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.[3]

II. ANALYSIS

A. Exceptional Ability

The Petitioner asserted that he meets at least three of the regulatory criteria for classification as an individual of exceptional ability. In denying the petition, the Director determined that the Petitioner fulfilled only the academic record criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A) and the membership criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E).

In the appeal brief, the Petitioner maintains that he also meets the ten years of full-time experience criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B), the salary criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D), and the recognition for achievements and significant contributions criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F). After reviewing the evidence, we conclude that the record does not support a finding that the Petitioner satisfies the requirements of at least three criteria.

> *An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability.* 8 C.F.R. § 204.5(k)(3)(ii)(A).

The Petitioner submitted an official academic transcript indicating that he completed 11 courses at [redacted] in 1995, but this transcipt does not show that he received a degree, diploma, certificate, or similar award from the university. In addition, he presented a certificate from [redacted] stating that he completed instruction in "Windows 98, Word, Excel, and Access" (1999). This certificate, however, is not an official academic record. Nor has the Petitioner provided evidence demonstrating that [redacted] constitutes "a college, university, school, or other institution of learning." For the aforementioned reasons, we withdraw the Director's determination that the Petitioner meets this criterion.

[3] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought. 8 C.F.R. § 204.5(k)(3)(ii)(B)

As evidence of his ten years of entrepreneurial experience, the Petitioner presented a December 2019 letter from [redacted] stating that he served as "the COO/Manager of our project [redacted] in the city of [redacted] . . . from February 2006 to January 2009." This letter, however, did not state that his experience was "full-time."

In addition, the Petitioner submitted a May 2018 letter from [redacted] indicating that the Petitioner has worked for the organization in "a full-time position, from February 2009 to July 2016 as Director and Coordinator." This letter further states that the Petitioner "has been working from distance as a Consultant and Advisor" since August 2016.[4] With the appeal, the Petitioner provides a March 2020 notarized letter asserting: "I was employed full-time from February 2009 to July 2016 as Director and Coordinator (Manager) of [redacted] Due to traveling abroad, my role changed to that of a consultant, from 2016 onwards." These letters do not indicate that the Petitioner's work as a consultant was full-time.

The aforementioned letters from the [redacted] and the Petitioner fall short in demonstrating that he has at least ten years of full-time experience as an entrepreneur. Accordingly, the Petitioner has not established that he meets the requirements of this regulatory criterion.

Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii)(D).

The May 2018 letter from [redacted] stated that the Petitioner received R$ 252,000 in 2015, R$ 176,000 in 2016, and R$ 131,000 in 2017. In addition, the December 2019 letter from [redacted] indicated that he received monthly compensation in the amount of R$ 20,000 from February 2006 until January 2009. The Petitioner also submitted information from the Salario BR website listing the corresponding salaries for entrepreneurs at small, medium, and large organizations at various levels of experience.[5]

To satisfy this criterion, the evidence must show that an individual has commanded a salary or remuneration for services that is indicative of his claimed exceptional ability relative to others working in the field.[6] The Director's decision noted that "the information from the website provides the salary based upon experience (trainee to master and for small to major organizations)" and that this information was not an adequate basis for comparison in demonstrating that the Petitioner's salary is indicative of exceptional ability. Additionally, the Salario BR website listed a "data validity" period from "12/26/18 to 12/26/19." Because the Salario BR information is not contemporaneous with the

[4] Part 3 of the Immigrant Petition for Alien Worker, Form I-140, lists the Petitioner's "Date of Arrival" in the United States as August 19, 2015.

[5] This salary survey was based on a population of 220 salaries with a sampling of 100 salaries.

[6] *See* USCIS Policy Memorandum PM-602-0005.1, *Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator's Field Manual (AFM) Chapter 22.2, AFM Update AD11-14* 21 (Dec. 22, 2010), https://www.uscis.gov/legal-resources/policy-memoranda.

years for which the Petitioner documented his earnings (2006-2009 and 2015-2017), he has not shown that the former provides a proper analysis of salary. Here, the Petitioner has not offered documentation showing that his earnings are indicative of exceptional ability relative to others in the field. Based on the foregoing, we agree with the Director that the Petitioner has not demonstrated that he meets this regulatory criterion.

Evidence of membership in professional associations. 8 C.F.R. § 204.5(k)(3)(ii)(E).

The Petitioner contends that his membership in the Brazilian Distance Learning Association (BDLA) meets this criterion. As evidence for this criterion, the Petitioner provided his BDLA membership card and a declaration from the association's chairman stating that BDLA is "a non-profit scientific society, that has as an objective: The learning, the development, the promotion and the diffusion of open, flexible, and distance learning." This information is not sufficient to demonstrate that BDLA has a membership body comprised of individuals who have earned a U.S. baccalaureate degree or its foreign equivalent, or that the organization otherwise constitutes a professional association.[7] Accordingly, we withdraw the Director's determination that the Petitioner meets this criterion.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations. 8 C.F.R. § 204.5(k)(3)(ii)(F).

As evidence for this criterion, the Petitioner provided a Certificate of Achievement (February 2018) in recognition of his "exceptional achievement and contribution to the [redacted]."[8] The Petitioner also submitted a letter from [redacted] Chairman of the City Council of [redacted], discussing the Petitioner's involvement with the [redacted] stated: "I am responsible to the City Council for the implementation of the [redacted] I supervised all the steps of execution until the end. Numerous adjustments were necessary to adapt to our reality and meet the demands and [the Petitioner] was always quick to perform tasks and with extreme professionalism." The aforementioned certificate and letter from [redacted] reflect local recognition from the Brazilian municipality of [redacted] and they are not sufficient to demonstrate the Petitioner's achievements and significant contributions to the industry or field. For example, the certificate and letter from [redacted] were unaccompanied by evidence indicating that the Petitioner's work involving the [redacted] has significantly affected the online learning industry or entrepreneurial field.

In addition, the Petitioner submitted recommendation letters from colleagues mentioning his work for [redacted] and [redacted] and [redacted].[9] While these letters discuss the Petitioner's projects for his employers and clients, the evidence is not sufficient to show that his work constituted achievements and significant contributions to the industry or field. In his appeal brief, the Petitioner contends that the

[7] The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definition: "Profession means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry in the occupation."

[8] This certificate was signed by [redacted], Chairman of the City Council of [redacted]

[9] Formal recognition that is contemporaneous with the individual's claimed contributions and achievements may have more weight than letters prepared for the petition "recognizing" the individual's achievements. *See* USCIS Policy Memorandum PM 602-0005.1, *supra*, at 23.

recommendation letters "are exactly the type of independent objective evidence from professionals in the field that are often used to attest to an alien's significant contributions," but he does not specifically identify the achievements and significant contributions to the industry or field for which he is responsible. Regardless, the evidence does not show that the Petitioner's work has had an impact beyond his employers, clientele, and their projects at a level indicative of achievements and significant contributions to the industry or field. For these reasons, the Petitioner has not established that he fulfills this criterion.

For the reasons set forth above, the evidence does not establish that the Petitioner satisfies at least three of the criteria at 8 C.F.R. § 204.5(k)(3)(ii) and has achieved the level of expertise required for exceptional ability classification.

B. National Interest Waiver

The remaining issue to be determined is whether the Petitioner has established that a waiver of the requirement of a job offer, and thus a labor certification, would be in the national interest. For the reasons discussed below, we agree with the Director that the Petitioner has not sufficiently demonstrated the national importance of his proposed endeavor under the first prong of the *Dhanasar* analytical framework.

Regarding his claim of eligibility under *Dhanasar*'s first prong, the Petitioner indicated that he intends to continue his career "in in the fields of information technology (IT) and business development to create new businesses as an entrepreneur in the United States." He asserted that he plans to "support companies in a variety of industries to implement IT projects and solutions specifically tailored to improve their efficiency and provide them with competitive advantages." The Petitioner further stated: "Through my company, I will provide IT solutions and services to companies . . . that will bring about improvements such as reduced costs and increased efficiency." He contended that his "company will also provide American companies with advanced and innovative search engine optimization, Amazon store creation, and other e-commerce tools to improve their online visibility to yet unreached potential customers." In addition, the Petitioner noted that he is "in the process of becoming a partner in [redacted]" and that is duties for this company include "managing project execution processes, improving customer online visibility, and financial management."

The record includes information about immigrants as drivers of U.S. entrepreneurship, the value of entrepreneurs to our country's economy, the impact of small business on the U.S. economy, the popularity of distance learning course options, trends in organizational learning solutions, the changing role of IT in the future of business, the effect of technology on the global economy, and foreign-born entrepreneurs as drivers of American innovation. In addition, the Petitioner provided articles discussing immigrants' contribution to the U.S. economy, the value of entrepreneurs to the global economy, the economic impact of high-growth startups, distance education enrollment, the benefits associated with e-learning, business transformation for the digital age, the ways technology can help the economy, immigrants' spending power and tax contributions, and the entrepreneurial legacy of immigrants and their children. He also submitted information about immigration as an entrepreneurial resource, immigrants' role in economic growth, entrepreneurs as drivers of economic development, small companies as engines of job creation, the rise of immersive learning, the value of flexible IT services in supporting modern business initiatives, digital business modeling, the economic

contribution of immigrant-launched businesses, and immigrant entrepreneurship in America. The record therefore shows that the Petitioner's proposed work as an IT entrepreneur has substantial merit.

In determining national importance, the relevant question is not the importance of the field, industry, or profession in which the individual will work; instead we focus on the "the specific endeavor that the foreign national proposes to undertake." *See Dhanasar*, 26 I&N Dec. at 889. In *Dhanasar*, we further noted that "we look for broader implications" of the proposed endeavor and that "[a]n undertaking may have national importance for example, because it has national or even global implications within a particular field." *Id.* We also stated that "[a]n endeavor that has significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area, for instance, may well be understood to have national importance." *Id.* at 890.

In his appeal brief, the Petitioner asserts that his proposed endeavor stands to generate "broad reach and industry impact . . . through his first-hand expertise when applied to technology, or any other industry." He contends that his undertaking offers "broad implications to the national and international digital trade sector, particularly through the implementation of tech-fused platforms that allow for an improved business ecosystem " The Petitioner further argues that his proposed work "cannot be underestimated when consider[ing] the macro effects it has in the U.S. economy." In addition, he claims that his endeavor "will produce substantially positive economic opportunities for the nation, due to the ripple effects of his professional activities." The Petitioner also states that his undertaking "will maximize business revenue, and ultimately increase the flow of money in the U.S. on a national level, thus contributing to U.S. gross domestic product (GDP)."

To evaluate whether the Petitioner's proposed endeavor satisfies the national importance requirement we look to evidence documenting the "potential prospective impact" of his work. Although the Petitioner's statements reflect his intention to provide valuable IT services, he has not offered sufficient information and evidence to demonstrate that the prospective impact of his proposed endeavor rises to the level of national importance. In *Dhanasar* we determined that the petitioner's teaching activities did not rise to the level of having national importance because they would not impact his field more broadly. *Id.* at 893. Here, we conclude the record does not show that the Petitioner's proposed endeavor stands to sufficiently extend beyond his company, future clientele, or business partnership to impact his field or the IT industry more broadly at a level commensurate with national importance.

Furthermore, the Petitioner has not demonstrated that the specific endeavor he proposes to undertake has significant potential to employ U.S. workers or otherwise offers substantial positive economic effects for our nation. Without sufficient information or evidence regarding any projected U.S. economic impact or job creation attributable to his future work, the record does not show that benefits to the regional or national economy resulting from the Petitioner's IT projects would reach the level of "substantial positive economic effects" contemplated by *Dhanasar*. *Id.* at 890. Accordingly, the Petitioner's proposed work does not meet the first prong of the *Dhanasar* framework.

Because the documentation in the record does not establish the national importance of his proposed endeavor as required by the first prong of the *Dhanasar* precedent decision, the Petitioner has not

demonstrated eligibility for a national interest waiver. Further analysis of his eligibility under the second and third prongs outlined in *Dhanasar*, therefore, would serve no meaningful purpose.

III. CONCLUSION

The Petitioner has not established that he satisfies the regulatory requirements for classification as a member of the professions holding an advanced degree or as an individual of exceptional ability. Furthermore, as the Petitioner has not met the requisite first prong of the *Dhanasar* analytical framework, we conclude that he has not established he is eligible for or otherwise merits a national interest waiver as a matter of discretion. The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.